Supreme Court, U.S.
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No. 85-1903

In The

Supreme Court of the United States

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

vs.

RICHARD SANTISTEVAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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ISSUE PRESENTED FOR REVIEW

Does the use of sensory enhancement devices to detect the presence of substances on the outer surfaces of people's hands violate a reasonable expectation of privacy so as to constitute a "search" under the fourth amendment to the United States Constitution?

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OPINION BELOW

The trial court's unreported order is included as Appendix A; the opinion of the Colorado Supreme Court, *People v. Santistevan*, No. 85SA86 (Colo. March 17, 1986) is included as Appendix B. The opinion is published as *People v. Santistevan*, 715 P.2d 792 (Colo. 1986).

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JURISDICTION

The judgment of the Colorado Supreme Court was issued on March 17, 1986. In its opinion, the Colorado Supreme Court held that a "search" occurred when police conducted an ultraviolet light scan over an individual's hands. The Court did not rely on any independent state ground for its decision; rather, it based its ruling solely on the fourth amendment to the United States Constitution and subsequent cases interpreting that provision. Jurisdiction is invoked pursuant to 28 U.S.C. sec. 1257 and to S. Ct. R. 17.1(b) and (c). A conflict presently exists in the decisions of the various courts of appeals and in the decisions of the state and federal courts regarding a significant issue of federal law which is likely to recur frequently and have an adverse impact on the use of many types of legitimate police investigative techniques.

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CONSTITUTIONAL PROVISIONS

Amendment IV of the United States Constitution states in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

Amendment XIV, section 1 of the United States Constitution provides inpertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

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FACTUAL BACKGROUND

On New Years Day, 1984, Mr. Leon Piper, the manager and part owner of the Trinidad Motor Inn in Trinidad, Colorado, reported the theft of money from the motel's coin-operated laundry and vending machines to Investigator Thomas R. Lucas of the Trinidad Police Department. In an effort to catch the thief or thieves, the officer put fluorescent powder and paste into and around the coin box of one of the machines. Fluorescent material will give off a yellowish tinge when exposed to an ultraviolet light.

The next day, January 2, 1984, Mr. Piper notified the police officer that money had again been taken from the machines. Because the manager and Officer Lucas found coins from the "marked" machine in the cash register at the front desk of the motel, their suspicions focused on the four desk clerks with access to the laundry room at the time of the theft. The manager contacted two of the off-duty employees and asked them to come to the motel. One other employee and the respondent were already at the

Trinidad Motor Inn for their regular work shifts.[1] The assembled clerks, including the respondent, were asked by Officer Lucas to place their hands under the ultraviolet light that had been set up by the officer for that purpose. The officer testified that he advised the clerks that he was investigating the coin thefts and that his asking them to place their hands under the light was part of his investigation.

The respondent, according to the testimony of Officer Lucas, showed no reluctance in submitting his hands to the light, and the respondent himself testified he placed his hands under the light "voluntarily" and without force being used or threats being made. The officer stated that he would not and could not have done anything about it if the respondent refused to cooperate. Officer Lucas, by use of the ultraviolet light, determined that the respondent had fluorescent powder on his hands.

After then being advised of and waiving his *Miranda*[2] rights, the respondent told Officer Lucas that the coins might have come from a customer who came in during his shift. The respondent also said he had repaired one of the vending machines during the night. The respondent was not then arrested, but was allowed to go home.

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[1]Lisa Piper, another employee, apparently came in later and submitted to the ultraviolet light examination.

[2]*Miranda* v. *Arizona*, 384 U.S. 436 (1966).

STATE COURT PROCEEDINGS

On April 25, 1984, a complaint charging the respondent with burglary was filed. Colo. Rev. Stat. sec. 18-4-204 (1978). The respondent entered a plea of not guilty on November 5, 1984, and trial was set for April 16, 1985. Prior to trial the respondent moved to suppress the results of the ultraviolet light examination because, among other things, the procedure was an illegal search. The respondent's Motion to Suppress was granted by the Colorado District Court on March 8, 1985; the court determining it to be an illegal search. The People filed, on March 15, 1985, a Notice of Interlocutory Appeal.[3]

In a 4-3 decision, issued on March 17, 1986, the Colorado Supreme Court determined that the respondent had indeed been subjected to a fourth amendment "search." Citing, among other cases, *Katz v. United States*, 389 U.S. 347 (1967); *Cupp v. Murphy*, 412 U.S. 291 (1973); *United States v. Kenaan*, 496 F.2d 181 (1st Cir. 1974), the Court held that the respondent had a reasonable expectation of privacy against such an extraordinary manner of viewing his hands. The Colorado Supreme Court, in its opinion, then remanded the case to the district court to determine whether the respondent had voluntarily consented to the

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[3]Colo. Rev. Stat. sec. 16-12-102 (1978) affords the prosecution the right to an interlocutory appeal of "any decision of the trial court in a criminal case upon any question of law." *See* Colo. R. App. P. 4.1.

search.[4] The Colorado Appellate Rules do not provide for petitions for rehearings in interlocutory appeals.[5]

REASONS TO ALLOW THE WRIT

This honorable Court should issue its writ and review the holding of the Colorado Supreme Court because the case presents a simple and concise factual situation which would allow the court to develop the law with respect to what constitutes a "search" under the fourth amendment of the United States Constitution when sensory enhancement techniques are used. Yet the case, at the same time, would give the Court the perfect opportunity, if it so desired, to review the fourth amendment's "expectation of privacy" analysis of *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), that has proven confusing and unworkable from the standpoints of law en-

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[4]The case, nevertheless, is a final determination subject to and deserving of the granting of a Petition for Writ of Certiorari. Such a suppression ruling of the Colorado Supreme Court, in an interlocutory appeal, cannot be reasonably raised later in the proceedings, whether the respondent is later convicted or acquitted. *New York v. Quarles*, 104 S. Ct. 2626 (1984). Thus, although there would be further state proceedings, the impact of the published Opinion of the Colorado Supreme Court, which is of questionable constitutionality, would be adverse to the prosecutors of the state in their investigations using fluorescent lights or other, analogous scientific examinations. *Cf. Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 486 (1975). The federal constitutional issue would survive the additional state proceedings, and the State of Colorado would not get another chance to have it reviewed. *Id.*

[5]Colo. R. App. P. 4.1(g).

forcement personnel, private citizens, and legal commentators. The sensory enhancement here, it should be noted, unlike many other sensory enhancement cases, was capable *only* of trapping the guilty or those to whom the finger of guilt points most unequivocally. The enhancement here did not and could not infringe on any privacy expectations of the innocent.[6]

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[6]What perhaps should be done with the *Katz* test is that reasonable expectations of privacy should be measured by the expectations of the *innocent* masses that the fourth amendment was meant to protect. *See Loewy, The Fourth Amendment as a Device for Protecting the Innocent,* 81 Mich. L. Rev. 1229 (1983).

> Criminals or those who possess evidence of crime are allowed to object to the manner in which such evidence was obtained only because the search or seizure may have created an unjustifiably high risk of an intrusion upon an innocent person's privacy. Therefore, devices such as marijuana-sniffing dogs which can only detect contraband and do not intrude upon the innocent ought to be allowed regardless of probable cause or a warrant. Many substantive fourth amendment decisions, particularly those dealing with expectations of privacy and consent, have focused on the rights of the guilty to such an extent that their impact on the innocent has been lost.

Loewy, *supra,* at 1272. Here, the test, like a "dog-sniff," will only alert to facts strongly indicative of guilt, which surely justify a rebuttable presumption. The presumably innocent persons would not have fluorescent material on their hands. Thus, the ultraviolet light exposes no protected secrets about the nonguilty employees. Consequently, the guilty party has no reasonable expectation that his criminal conduct should remain secret. *See* 1 W. LaFave, *Search and Seizure,* sec. 2.2 (Supp. 1986). Such an improved *Katz* test would thus allow logical distinctions between, for example, magnetometors that alert to *any* metal on the body and shoplifting sensors that only alert to stolen articles. *Id.* Such a rule would also allow for the running of a trace metals test on the hands of a suspect, without offending fourth amendment search protections, since such a test would not reasonably offend the innocent by disclosing any secrets or embarrassing facts. *See United States v. Jacobsen,* 466 U.S. 109 (1984).

Firstly, it is clear here that the facts do not raise issues of an inappropriate seizure or intrusions allowable as incident to a seizure or arrest. Here, there was missing sufficient probable cause that would support a search incident to either a formal or informal arrest. *See Cupp v. Murphy, supra.* The issues of illegal seizure or investigatory stop were not raised by the respondent here, nor would it be supported by the facts here. The respondent was already at the location of the ultraviolet light examination, since it was his place of employment The officer conducting the examination asked the respondent to cooperate and the officer was not prepared to use any coercion whatsoever to enforce compliance.

However, if this was not a case of a "seizure" of a person against whom there existed probable cause, neither was it a seizure to collect evidence by way of a "roundup" of persons that would not even be considered reasonable suspicion suspects. *See Davis v. Mississippi,* 394 U.S. 721 (1969). This factual situation falls outside the facts found both in *Cupp v. Murphy, supra,* and in *Davis v. Mississippi, supra.* Here, unlike the situation in *Davis v. Mississippi, supra,* there were four or five individuals that apparently made up the entire universe of those who could have committed the crimes. The examination of their hands here did not become part of a general seizure of possible defendants, but it was, instead, controlled "by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation," evidence to be found on individuals, "for whom there is no probable cause to arrest ...." *Davis v. Mississippi, supra,* at 728.

The issue here, then, is purely one of what exactly constitutes a reasonable expectation of privacy and there-

fore what makes this situation fall within or without the search protections of the fourth amendment. Sensory enhancement techniques are not only becoming more common, they are becoming more refined, less intrusive, and more accurate. They are a valuable tool for law enforcement officials to detect reliable evidence of criminal activity. Although they are increasingly being subjected to judicial scrutiny, *see, e.g., Lucas v. United States,* 411 A.2d 360 (D.C. App. 1980) *reh'g denied* 414 A.2d 830 (sensormatic shoplifting detection system); *United States v. Albarado,* 495 F.2d 799 (2d Cir. 1974) (magnetometer); *United States v. Sullivan,* 544 F. Supp. 702 (D. Me. 1982) *aff'd* 711 F.2d 1 (1st Cir. 1983) (geiger counters); *State v. Howell,* 524 S.W. 2d 11 (Mo. 1975) (trace metal), their use should not be curtailed absent a conclusion that they intrude upon significant privacy interests of the general public.

The *Katz* analysis was meant to get the fourth amendment out of the narrowly drawn pigeon-holes of "protected places" and make the amendment applicable to the electronic age. But the *Katz* rule can hardly be said to have "produced clarity where theretofore there had been uncertainty. If anything, the exact opposite has occurred." 1 W. LaFave, *Search and Seizure,* sec. 2.2 (1978). It has definitely not resolved whether or not an ultraviolet light viewing is a search.

Courts are split in their resolution of this ultraviolet problem, although most of them attempt to analyze it using the same supposedly simple two-prong test drawn from *Katz. United States v. Kenaan, supra,* relied on by the Colorado Supreme Court, holds that the ultraviolet light

examination of hands is a search under the fourth amendment. Yet other federal and non-federal cases hold at least as persuasively the opposite. *See United States v. Richardson,* 388 F.2d 842 (6th Cir. 1968); *United States v. DeMarsh,* 360 F. Supp. 132 (E.D. Wis. 1973); *United States v. Millen,* 338 F. Supp. 747 (E.D. Wis. 1972); *Commonwealth v. DeWitt,* 226 Pa. Super. 372, 314 A.2d 27 (1973). Some courts, apparently unwilling to make a comment on ultraviolet examinations unless the issue is squarely raised by the parties, are significantly silent as to whether they are searches or merely unintrusive viewings. *See People v. Marquis,* 24 Ill. App. 3d 653, 321 N.E. 2d 480 (1974) (ultraviolet examination after arrest); *United States v. Young,* 35 C.M.R. 852 (A.F.C.M.R. 1965) (examination of mailroom employees' hands before arrest).

The confusion in the application of the *Katz* analysis is not confined to ultraviolet light scans, but extends also to analogous investigatory scientific techniques as well. *See e.g., United States v. Bell,* 464 F.2d 667 (2d Cir. 1972) *cert. denied* 409 U.S. 99 (magnetometer is not an "unreasonable search"); *United States v. Albarado, supra* (magnetometer is a search). With the continued advance of scientific invention, it is clear that there are many other factual situations which will arise in the future and which will need to be resolved in a consistent, principled manner.

The Colorado Supreme Court's decision here exemplifies how the *Katz* test can be misapplied. The first prong of *Katz* was clearly not met. The respondent here did not demonstrate a subjective expectation of privacy. His hands were not enclosed in gloves or hidden in pockets. He protested not when asked to place his hands under the light. Neither was the second prong met. The respondent

here could not have had a reasonable expectation of privacy, for his hands were knowingly exposed to the public. *Katz v. United States, supra,* at 351. *See also Cardwell v. Lewis,* 417 U.S. 583 (1974). The use of the ultraviolet light was a mere nonintrusive sensory enhancer that could highlight what was there to be sensed. *See United States v. Place,* 462 U.S. 696 (1983) (use of "drug-sniffing" dog); *Texas v. Brown,* 460 U.S. 730 (1983) (use of flashlight); *United States v. Lee,* 274 U.S. 559 (1927) (use of searchlight).

Since, as demonstrated above, courts come to such varied results using the two-prong test of *Katz* to determine what is a "search" by measuring both subjective and reasonable expectations of privacy, the time is ripe for this court to reassess its *Katz* analysis and come up instead with a redefined or refined test that is workable and predictable. The divergence in court opinions amply shows that *Katz* now is of questionable practicability. It is, therefore, appropriate for the Court to use this opportunity to either refine or redefine the *Katz* analysis of the fourth amendment. The use of the expectation of privacy test in cases involving similar facts as here can and does lead to inconsistent and contradictory results:

> None of this, of course supplies a definitive answer to the question we started with: whether using an ultraviolet light to detect a fluorescent substance on one's hands constitutes a search. It only confirms the earlier assertion that there is no readily apparent "correct" answer. In the final analysis, *Katz* requires that a value judgment be made; though it "begs the question," "the basis of the *Katz* decision seems to be that the fourth amendment protects those interests that may justifiably claim fourth amendment protection."

1 W. LaFave, *Search and Seizure*, sec. 2.2 (1978) (footnotes omitted). This Court should use this opportunity to end the circularity in reasoning that pervades lower court decisions and at least issue a holding that will provide guidance in all sensory enhancement investigations.

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CONCLUSION

The present analysis used to determine both fourth amendment searches and state constitutional bill of rights protections has been perhaps unfairly extended by some courts, including Colorado, to frustrate legitimate crime investigation.[7] Neither does the present analysis protect individuals and allow them to know which of their effects are secure from what types of views. The instant case is deserving of a writ of certiorari, for it provides the perfect and "clean" factual situation that would allow this honorable Court to issue a holding of general applicability to all sensory enhancement cases, and in the process, to reexamine and further develop the presently unworkable test that has come out of *Katz v. United States, supra.*[8]

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[7]See, e.g., *People v. Unruh*, 713 P.2d 370 (Colo. 1986); *People v. Oates*, 698 P.2d 811 (Colo. 1985); *People v. Sporleder*, 666 P. 2d 135 (Colo. 1983).

[8]If this Court believes that its already established "sensory enhancement" cases cover the instant factual situation, then the petitioner requests that the writ of certiorari be granted, and that this case be summarily reversed on the application of federal law.

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APPENDIX A

DISTRICT COURT COUNTY OF LAS ANIMAS
STATE OF COLORADO

CASE NO. 84CR56

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

RICHARD SANTISTEVAN,

Defendant,

ORDER

THE COURT, having reviewed the evidence and authorities in regards to the Defendant's Motion To Suppress, heard by the Court on the 5th Day of November, 1984, FINDS AS FOLLOWS:

(1) The Defendant was searched by police officers of the City of Trinidad, Colorado on the 2nd day of January, 1984.

(2) That the search consisted of the display of the Defendant's hands under an ultra-violet light in an effort to detect the presence of a substance which had been placed inside a coin operated machine, at the request of the owners of The Trinidad Motor Inn. Said substance would react to the light under which the Defendant was requested to place his hands.

(3) The search was conducted without a warrant.

(4) The police officers had time to summon other employees of the owners to the site of the search from their

homes and that these additional employees were also subjected to the same type of search as the Defendant.

(5) That the investigation did not narrow down to the Defendant until after the search had been completed.

(6) The police did not have probable cause to arrest the Defendant until after the search.

(7) The Defendant was asked to place his hands under the light, but was not told the purpose for which he was being asked to perform this act.

(8) THE COURT FINDS that the evidence is not sufficient to establish that the Defendant voluntarily consented to the search.

(9) THE COURT FINDS there were no emergency factors present which would have allowed the warrantless search.

(10) THE COURT FINDS there was no probable cause to arrest, therefore, the search cannot be incident to the arrest.

WHEREFORE, THE COURT grants the Defendant's Motion To Suppress both the search and the results of that search.

Dated this 8th day of March, A. D. 1985.

BY THE COURT:

/s/ George A. Newnam
Acting District Judge

Copies to:

Jon Neil Barclay
Garrett Sheldon

APPENDIX B

SUPREME COURT, STATE OF COLORADO

No. 85SA86

March 17, 1986

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

vs.

RICHARD SANTISTEVAN,

Defendant-Appellee.

Interlocutory Appeal from District Court,
Las Animas County

Honorable George A. Newman, District Judge

EN BANC

RULING REVERSED AND CASE REMANDED FOR FURTHER PROCEEDINGS

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JUSTICE DUBOFSKY delivered the Opinion of the Court.

JUSTICE ERICKSON dissents, and JUSTICE ROVIRA and JUSTICE VOLLACK join in the dissent.

In this interlocutory proceeding under C.A.R. 4.1, the People appeal from an order of the Las Animas County District Court suppressing certain evidence against the defendant Richard Santistevan in a prosecution for third degree burglary.[1] The evidence suppressed consisted of the results of a police officer's examination of the defendant's hands by means of an ultraviolet light. The district court ruled the ultraviolet light examination unconstitutional as a warrantless nonconsensual search not supported by exigent circumstances. We reverse.

On January 1, 1984, the manager of a motel in Trinidad, Colorado, reported the theft of money from coin-operated laundry machines and vending machines in the motel to an officer of the Trinidad Police Department. In an effort to identify the thief, the officer put fluorescent powder and paste into and around the coin box of one of the machines. The next day, the motel manager notified the police officer that money had again been taken from the machines.

Because the manager and the police officer found coins from the marked machine in the cash register at the front desk of the motel, their suspicions focused on the desk clerks and employees with access to the laundry room. The manager contacted two of the employees and asked them to come to the motel. One other employee and the defendant were already at the motel for their regular work shifts. The assembled employees were asked to place their hands under an ultraviolet light that had been set up by the police officer. The evidence in the record conflicts as to whether the employees were informed by the police of-

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1. § 18-4-204, 8 C.R.S. (1978).

ficer of the nature or purpose of the investigation and *whether the officer advised the employees of their Miranda*[2] rights before examining their hands. When the defendant, without apparent objection, placed his hands under the ultraviolet light, the police officer discovered traces of fluorescent powder or paste. The officer then gave the defendant a *Miranda* advisement, and, after questioning him in the motel office, permitted him to leave.

On April 25, 1984, a complaint charging the defendant with burglary was filed. Prior to trial the defendant moved to suppress the results of the ultraviolet light examination on the grounds that the examination was not preceded by *Miranda* warnings and that the procedure was an unconstitutional search. The district court granted motion to suppress.

On appeal the People contend that the examination of the defendant's hands was not a search within the scope of constitutional prohibitions against unreasonable searches and seizures. They further argue that if the district court ruled correctly that the examination was a search, then the defendant voluntarily consented to the search, thereby obviating the need for a warrant. We decide that the police investigative procedure here was a search, but that the court's consideration of whether the defendant consented to the search suggests an improper focus on the defendant's lack of knowledge of the purpose of the ultraviolet light examination.

I.

Under the fourth amendment to the United States Constitution, "[t]he right of the people to be secure in

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2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." Article II, § 7 of the Colorado Constitution also provides that "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures."

As we stated in *People v. Unruh*, 713 P.2d 370, — (Colo. 1986), when an individual challenges as a search a governmental investigative activity that involves an intrusion into that person's privacy, we must conduct "a two-step inquiry: (1) was the intrusion a search; (2) if so, was it a reasonable search." *See also Katz v. United States*, 389 U.S. 347 (1967). To answer the first question, we must determine whether the individual had a reasonable expectation of privacy with respect to the governmental intrusion. We conclude on the basis of this analysis that the investigative activity employed by the police officer in the present case constituted a search, a conclusion that finds support in the opinions of other courts.

In *Cupp v. Murphy*, 412 U.S. 291 (1973), the defendant, who was suspected of strangling his wife, was detained at the police station while the police took samples of scrapings from under his fingernails. The samples were analyzed and later introduced as incriminating evidence at the defendant's trial. Although the United States Supreme Court ultimately decided that the taking of the samples was permissible under a recognized exception to the warrant requirement, it held that "the search of the respondent's fingernails went beyond mere 'physical characteristics . . . constantly exposed to the public,' . . . and constituted the type of 'severe, though brief, intrusion

upon cherished personal security' that is subject to constitutional scrutiny." *Id.* at 295 (citations omitted). Similarly, in the present case, the examination of Santistevan's hands with an ultraviolet light went beyond the type of exposure to which, in the absence of governmental interference, persons are subjected each day. As did the defendant in *Cupp v. Murphy*, Santistevan had a reasonable expectation of privacy from an ultraviolet light examination of the substances present on his hands, the incriminating character of which was not evident to the naked eye. *See* 1 W. LaFave, *Search and Seizure* §§ 2.2, 2.6 (1978); *see also State v. Howell*, 524 S.W.2d 11 (Mo. 1975) (swabbing of defendant's hands with solution that allowed police officers to determine that defendant recently had fired a gun was a search).

Another court, faced directly with the question of whether the use of an ultraviolet lamp to examine a suspect's hands constituted a search, stated that "[t]here can be little doubt that an inspection of one's hands, under an ultraviolet lamp, is the kind of governmental intrusion into one's private domain that is protected by the Fourth Amendment." *United States v. Kenaan*, 496 F.2d 181, 182 (1st Cir. 1974). The defendant in *Kenaan* was arrested after an ultraviolet lamp exposed traces of fluorescent powder on his hands, indicating that he had handled a parcel that previously had been dusted with fluorescent powder and contained cocaine. The court in *Kenaan* concluded that "the reach of the Fourth Amendment . . . should certainly encompass a detailed inspection, by spe-

cial instrument, of one's skin." *Id.* (footnote omitted).[3] We agree with the reasoning in *Kenaan* and hold that a person has a reasonable expectation that police officers will not subject his hands to an ultraviolet lamp examination to discover incriminating evidence not otherwise observable and that requiring a person to submit to an ultraviolet lamp examination constitutes a search.

II.

Because we conclude that the governmental activity here constituted a search, we must determine whether the search was reasonable. *People v. Unruh*, 713 P.2d at —. A search conducted without prior judicial approval is *per se* unreasonable unless the search fits within an established exception to the warrant requirement. *Katz v. United States*, 389 U.S. at 357; *People v. Unruh*, 713 P.2d at —.

One of the exceptions to the warrant requirement, and the only one offered by the People as applicable to this case, is consent to the search.[4] A police officer may search

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3. Other courts have reached contrary conclusions. *See United States v. Richardson*, 388 F.2d 842 (6th Cir. 1968); *United States v. DeMarsh*, 360 F. Supp. 132 (E.D. Wis. 1973); *United States v. Millen*, 388 F. Supp. 747 (E.D. Wis. 1972); *Commonwealth v. DeWitt*, 226 Pa. Super. 372, 314 A.2d 27 1973).

4. Another exception to the warrant requirement is the situation in which probable cause exists to conduct the search and there is a risk that evidence will be lost or destroyed if the search is delayed. *United States v. Santana*, 427 U.S. 38 (1976); *People v. Gomez*, 632 P.2d 586 (Colo. 1981), *cert. denied*, 455 U.S. 943 (1982). Here, the district court concluded that the People did not establish probable cause to conduct the search in the first instance. Moreover, the

(Continued on following page)

for incriminating evidence when the person to be searched voluntarily consents. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). Consent is voluntary when it is the product of free and unconstrained choice and not the result of force, threat, or promise, express or implied. *Id.; People v. Elkhatib,* 632 P.2d 275 (Colo. 1981). Voluntariness is a question of fact to be determined from the totality of circumstances, and factors to be considered include the age, education and intelligence of the person consenting to the search; the duration, location, and other circumstances of the search; and the consenting person's state of mind. *People v. Carlson,* 677 P.2d 310, 318 (Colo. 1984); *People v. Helm,* 633 P.2d 1071 (Colo. 1981). The prosecution has the burden to prove voluntariness by clear and convincing evidence. *Carlson,* 677 P.2d at 318; *Helm,* 633 P.2d at 1077.

In asking us to overturn the district court's ruling that the evidence was "not sufficient to establish that the defendant voluntarily consented to the search," the People note that the defendant, age 21 and a high school graduate, testified that he put his hands under the light voluntarily, and that he was not threatened in order to obtain his consent. Although the district court concluded that the evidence was not sufficient to establish voluntary consent, the only specific finding supporting the court's con-

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(Continued from previous page)

People did not introduce evidence that might establish exigent circumstances such as proof that fluorescent powder may be easily washed off hands or proof that the powder remains on hands for a limited time only. Although we can conceive of situations in which an ultraviolet light examination may be conducted without the necessity of first obtaining a search warrant, in this case the People made no effort to claim or establish exigent circumstances.

clusion was that the defendant "was not told the purpose for which he was being asked to perform this act." Thus, the district court's ruling turns on the defendant's lack of knowledge of the purpose of the search.

No case in Colorado directly addresses the question of whether knowledge of the purpose of a search is a prerequisite to establishing the voluntary character of the consent to search. However, we have held that although the suspect's knowledge of a right to refuse consent is a factor to be taken into account, such knowledge is not a prerequisite to establishing the voluntary character of a consent search. *Schneckloth,* 412 U.S. at 248-49; *Helm,* 633 P.2d at 1077; *People v. Elkhatib,* 632 P.2d 275, 278 (Colo. 1981); *People v. Hayhurst,* 194 Colo. 292, 571 P.2d 721 (1977). Similarly, the clear lesson of cases from other jurisdictions is that while misrepresentation by the police about the purpose of a search may weigh against a finding of consent, *see, e.g., Alexander v. United States,* 390 F.2d 101 (5th Cir. 1968), and while a defendant's knowledge of the purpose of a search may be indicative of consent, *see, e.g., United States v. Bailey,* 447 F.2d 735 (5th Cir. 1971), such knowledge is not a prerequisite of voluntary consent to a search. *See, e.g., Ricketts v. State,* 417 A.2d 465 (Md. App. 1980), *aff'd* 429 A.2d 1025 (1981). We therefore conclude that knowledge of the purpose of a search is but one of the many factors to be considered by a trial court in determining whether a search was justified on the ground of consent.

The evidence in this case, as the People note, presents a number of factors that would support a finding that the defendant consented to the search of his hands. These

factors include the defendant's age, intelligence and education; the absence of promises, threats or other overbearing conduct on the part of the police officer; and the absence of any misrepresentation as to the purpose of the search.

There is, of course, evidence that militates against a finding of valid consent. In determining that the defendant did not voluntarily consent to the search the district court properly could take into account, among other things, the failure of the police to inform the defendant of the purpose of the search or of his right to refuse to be searched. We recognize that the district court is in the best position to weigh the competing considerations involved in the determination whether the search at issue in this case was consensual. However, because it appears that the district court gave undue significance to the defendant's lack of knowledge of the purpose of the search, to the exclusion of other relevant factors, we reverse the district court's finding that the defendant did not consent to the search and remand the case to the district court for reconsideration of this issue.

The judgment of the district court is reversed and the cause is remanded for proceedings in accordance with this opinion.

JUSTICE ERIKSON dissenting:

I respectfully dissent. In my view, the employment of an untraviolet light to determine the presence of fluorescent materials on the hands of a suspect does not constitute an invasion of a protected privacy interest or a search

under the fourth amendment to the United States Constitution or article II, section 7 of the Colorado Constitution. I would therefore hold, along with the majority of other courts, that illumination by ultraviolet light is not a search.

To determine what constitutes a "search,"we look first to the privacy interest defined in *Katz v. United States,* 389 U.S. 347 (1967). In *Katz,* telephone conversations by the defendant were overheard by police officers who had attached an electronic listening device (a detectaphone) to the exterior of a public telephone booth used by the defendant. In holding that electronic surveillance by the officers constituted a fourth amendment search, the Court abandoned the traditional view that a search requires a physical intrusion into a constitutionally protected area. The Court declared that "the Fourth Amendment protects people, not places," and concluded:

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

389 U.S. at 353. The test that emerged from *Katz* for determining the existence of a search was whether the intrusion violated a reasonable expectation of privacy possessed by the aggrieved party. *Id.* at 360 (Harlan, J., concurring); *Terry v. Ohio,* 392 U.S. 1 (1968). We have employed the *Katz* test to determine whether a search occurred under the United States or Colorado Constitution in a long line of cases. *See, e.g., People v. Unruh,* No.

84SA 299 (Colo. Jan. 21, 1986); *People v. Oates,* 698 P.2d 811 (Colo. 1985); *People v. Carlson,* 677 P.2d 310 (Colo. 1984); *People v. Sporleder,* 666 P.2d 135 (Colo. 1983).

It is well established that an observation by a lawfully positioned officer using his natural senses of sight, smell, and hearing does not constitute a search. Nor does the use of artificial illumination to enable the officer to see that which he would otherwise be unable to detect because of darkness amount to a search. *Texas v. Brown,* 460 U.S. 730 (1983); *People v. Shriver,* 186 Colo. 405, 528 P.2d 242 (1974). The rationale underlying these priciples is that a person can have no reasonable expectation of privacy in something he knowingly exposes to public view. *Katz,* 389 U.S. at 347. The same type of reasoning has caused the Supreme Court to conclude that the observation of a person's physical characteristics is not a search. *United States v. Dionisio,* 410 U.S. 1 (1973) (defendant had no reasonable expectation of privacy in the sound of his voice); *United States v. Mara,* 410 U.S. 19 (1973) (defendant had no reasonable expectation of privacy in the physical characteristics of his handwriting).

In *Commonwealth v. DeWitt,* 226 Pa. Super. 372, 314 A.2d 27 (1973), the leading case on the issue before us, the court relied on the similarity between physical characteristics and the presence of fluorescent material on a suspect's hand in holding that illumination by ultraviolet light does not constitute a search. The court said:

> [D]efendants had no reasonable expectation of privacy as to the presence of foreign matter on their hands independent of the expectation of the privacy of their premises, which had been legitimately invaded by the police. The [fluorescent] grease may be compared to a fingerprint or one's voice, which is "constantly exposed to the public." *United States v. Dio-*

> *nisio*. . . . The Fourth Amendment provides no protection for what "a person knowingly exposes to the public." *Katz v. United States*. . . . It is true that the grease could not be detected with the naked eye, but then, neither may a fingerprint be examined until there has been an application of ink.

314 A.2d at 30-31. All but one of the courts to have addressed the issue have agreed that illumination by ultraviolet light does not constitute a search. *See United States v. Richardson,* 388 F.2d 842 (6th Cir. 1968); *United States v. DeMarsh,* 360 F. Supp. 132 (E.D. Wis. 1973); *United States v. Millen,* 338 F. Supp. 747 (E.D. Wis. 1972); *but see United States v. Kenaan,* 496 F.2d 181 (1st Cir. 1974).

The majority rejects the prevailing view, relying on *Cupp v. Murphy,* 412 U.S. 291 (1969). In *Cupp,* the defendant's wife was found strangled to death in her home. When the defendant voluntarily went to the police station for questioning, the police, suspecting that a dark spot on the defendant's finger might be the victim's dried blood, took a scraping from his fingernail under his protest. The Supreme Court held that the scraping constituted a search, stating:

> Unlike the fingerprinting in *Davis* [*v. Mississippi,* 394 U.S. 721 (1969)], the voice exempler obtained in *United States v. Dionisio* . . . or the handwriting exemplar obtained in *United States v. Mara* . . . the search of respondent's fingernails went beyond mere 'physical characteristics . . . constantly exposed to the public,' . . . and constituted the type of 'severe, though brief, intrusion upon cherished personal security' that is subject to constitutional scrutiny.

412 U.S. at 295 (citations omitted). The majority suggests that *Cupp* stands for the proposition that an individual has

a reasonable expectation of privacy in the material on his hands which is not incriminating to the naked eye. The majority therefore concludes that illumination of a person's hand by an ultraviolet light constitutes a search because the fluorescent material is invisible to the naked eye.

In my view, relying on *Cupp* to conclude that the use of an ultraviolet light is a search ignores more recent decisions of the Supreme Court holding that the employment of various forms of sense-enhancing devices in the investigation of criminal activity does not constitute a search. In *Texas v. Brown,* 460 U.S. at 730, the Court held that the use of a flashlight to illuminate a darkened area is not a search. The same term the Court declared that subjecting luggage to a "canine sniff" by a trained narcotics detection dog at an airport does not constitute a search. *United States v. Place,* 462 U.S. 696 (1983); *but cf. People v. Unruh,* No. 84SA299 (Colo. January 21, 1986) (canine sniff of safe being held at police station as evidence in burglary case violated owner's reasonable expectation of privacy). The Court in *Place* reasoned that "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item." 462 U.S. at 707. The Court relied on *Place* in *United States v. Jacobsen,* 466 U.S. 109 (1984), to conclude that the use of a chemical field test to determine whether a suspected substance was cocaine was not a search. The Court observed that the field test, like the canine sniff, could only disclose the presence or absence of contraband. No other information was obtained by virtue of the test.

I believe that the decisions in *Brown, Place,* and *Jacobsen* support the general principle that "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afford [ ] them. . . ." *United States v. Knotts,* 460 U.S. 276, 282 (1983). The intrusion in this case was no greater than that occasioned by the use of a flashlight by a lawfully positioned officer. *See DeWitt,* 314 A.2d at 31. Furthermore, illumination by ultraviolet light is not significantly different than a canine sniff or a chemical field test. Each device reveals extremely limited information about the suspect or his possessions. The canine sniff and the chemical field test can only disclose the presence of contraband, and the ultraviolet light can only reveal that the suspect has handled items treated with fluorescent materials. Investigating officers learn no other private facts about the suspect by using these devices. Thus, contrary to the reasoning of the majority, by no stretch of the imagination does illumination by ultraviolet light amount to "'a detailed inspection, by special instrument, of one's skin.'" Slip op. at 6, quoting *United States v. Kenaan,* 496 F.2d 181, 182 (1st Cir. 1974) (the only case holding that illumination by ultraviolet light constitutes a search). It certainly cannot be said that an individual has a protected privacy interest in preventing the police from discovering incriminating evidence. *See United States v. Jacobsen,* 466 U.S. at 122 ("The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities.") (footnote omitted).

Accordingly, I would hold that the investigative procedure employed in this case was not a search and that the consent of the defendant was irrelevant. I would therefore reverse the suppression order of the district court and remand the case for further proceedings.

I am authorized to say that Justice Rovira and Justice Vollack join in this dissent.

(2)

Supreme Court, U.S.
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No. 85-1903

In the

Supreme Court of the United States

October Term, 1986

The State of Colorado,

Petitioner,

vs.

Richard Santistevan,

Respondent.

On Writ of Certiorari to the Colorado Supreme Court

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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ISSUES PRESENTED FOR REVIEW

I. Does the exposure to ultraviolet light of the surface of the hands of a person violate a reasonable expectation of privacy under the fourth amendment to the United States Constitution therefor constituting a "search"?

II. What is the correct standard to be used in evaluating investigatory techniques which are limited in both the manner in which the information is obtained and in the content of the information revealed by their use?

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Colorado District Attorneys Council and the states of Florida, Idaho, Indiana, Louisiana, Maryland, Missouri, North Dakota, Washington, and Wyoming, sponsored by their respective attorneys general, move for leave to file a brief in support of the petition for writ of certiorari for the following reasons.

1. Pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States, consent to file an amicus brief need not be had when the brief is being presented for a state sponsored by its attorney general. However, one of the amici, The Colorado District Attorneys Council, is not within the provisions of Rule 36.4.

2. The amici have the consent of the petitioner through the Colorado Attorney General, but the respondent through his counsel, Garrett Sheldon, denies his consent.

3. The amici curiae have a substantial interest in seeing this holding reviewed because they are all officers, organizations of officers, or represent officers, with law enforcement responsibilities in their respective jurisdictions. The holding of the Colorado court purports to construe the prior holdings of this court and the fourth and fourteenth amendments of the United States Constitution, which are binding law on all of the amici curiae. In addition, the holding of the Colorado court relies on prior holdings of the state and federal circuit courts located in the states of several of the amici.

4. The brief of amici curiae sets forth the question of law raised by the Colorado Supreme Court in a broader context than presented by the petitioner and from the unique viewpoint of local law enforcement officers. The amicus brief presents the problems encountered by law enforcement in evaluating the proper use of sensory enhancement devices which have been occasioned by differing interpretations of the holding of this court in *Katz v. United States*, 389 U.S. 347 (1967).

Wherefor, the amici curiae move for leave to file a brief in support of the petition for writ of certiorari.

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No. 85-1903

In the
Supreme Court of the United States
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The State of Colorado,
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Richard Santistevan,
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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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OPINION BELOW

The opinion of the Colorado Supreme Court is published as *People v. Santistevan*, 715 P.2d 792 (Colo. 1986)

INTEREST OF THE AMICI CURIAE

All amici have the burden of law enforcement responsibility within their organizations and for their respective jurisdictions. The wide discrepancies in lower federal and state court decisions purporting to interpret and apply this Court's holding in *Katz v. United States*, 389 U.S. 347 (1967) has left law enforcement with little direction concerning the evaluation and use of emerging investigatory technologies. The amici have noted with interest and appreciation recent decisions of the Court which have clarified troublesome fourth amendment areas.[1] However, the need for a comprehensive standard to provide guidance for law enforcement agencies seeking to utilize new technologies and investigatory techniques is apparent.

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1. Among the most helpful of recent decisions are those which have developed clearly delineated rules for the use of sensory enhancement devices such as beepers *(United States v. Knotts*, 460 U.S. 276 (1983) and *United States v. Karo*, 468 U.S. ——, 104 S. Ct. 3296 (1984), trained narcotics detection dogs *(United States v. Place*, 462 U.S. 696 (1983), and flashlights *(Texas v. Brown*, 460 U.S. 730 (1983), as well as the clarification of existing concepts drawn from the fourth amendment to the United States Constitution, *Dow Chemical Company v. United States*, No. 84-1259, 54 U.S.L.W. 4464 (decided May 19, 1986); *California v. Ciraolo*, No. 84-1513, 54 U.S.L.W. 4471 (decided May 19, 1986) (concerning the concept of "curtilage" and its relationship to fourth amendment concerns).

CONSTITUTIONAL PROVISIONS

Amendment IV of the United States Constitution states in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

Amendment V of the United States Constitution states in pertinent part:

. . . nor shall be compelled in any criminal case to be a witness against himself. . . .

Amendment XIV, section 1 of the United States Constitution provides in pertinent part:

No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

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REASONS TO ALLOW THE WRIT

This honorable Court should issue its writ and review the holding of the Colorado Supreme Court because the case provides an excellent opportunity for the Court to review the use of sensory enhancement investigatory technologies both in a historical perspective and with a view toward future innovations. The factual situation presents the Court with the occasion to develop a standard not only for the use of ultraviolet examinations but also for the

evaluation of other emerging technologies.[2] The confusing and often conflicting applications of the Court's holding in *Katz v. United States, supra,* have made the evaluation by law enforcement of new investigatory techniques untenable.

The application of the *Katz* analysis to ultraviolet light examination has produced only one other case, *United States v. Keenan,* 496 F.2d 181 (1st Cir. 1974),[3]

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2. Several other techniques, which share with ultraviolet examinations the common characteristic of being limited in their intrusiveness, might also be considered if the Court decides to formulate a comprehensive standard. *See e.g. Lucas v. United States,* 411 A.2d 360 (D.C. App. 1980), *reh'g denied* 414 A.2d 830 (sensormatic shoplifting detection system); *State v. Howell,* 524 S.W.2d 11 (Mo. 1975) (trace metal detection to determine if the person tested has recently fired a gun).

3. The Colorado Supreme Court relied solely on *Keenan* in deciding the ultraviolet light examination in this case was a "search". However, the analysis of other cases contained in *Keenan,* including this Court's holding in *Schmerber v. California,* 384 U.S. 757 (1966), is flawed. In stating that the court in *United States v. Richardson,* 388 F.2d 842 (6th Cir. 1968) incorrectly relied on *Schmerber, supra,* the *Keenan* court did not follow the complete line of reasoning contained in *Schmerber* and eliminated the fifth amendment argument detailed in *Schmerber.* "We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body . . . . the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Schmerber, supra,* at 768. This Court concluded in *Schmerber* that the correct standard for evaluating procedures which implicate the fourth amendment is reasonableness. The *Keenan* court merely concluded that the ultraviolet light examination fell within the ambit of the fourth amendment without an inquiry into the reasonableness of its use in view of the circumstances of the case or the manner in which it was used. In not inquiring, the *Kee-*

(Continued on following page)

finding the examination is a "search" within the meaning of the fourth amendment. The rationale used to conclude that ultraviolet light examinations did not implicate fourth amendment rights is explained in *Commonwealth v. DeWitt,* 226 Pa. Super 372, 314 A.2d 27 (1973):

"In any event, defendants had no reasonable expectation of privacy as to the presence of foreign matter on their hands. . . The grease [which contained fluorescent powder] may be compared to a physical characteristic, such as a fingerprint or one's voice, which is 'constantly exposed to the public.' *United States v. Dionisio,* 410 U.S. 14, 93 S.Ct. 764, 35 L.Ed.2d 67 (1963). The Fourth Amendment provides no protection for what 'a person knowingly exposes to the public'. *Katz v. United States,* (citations omitted) It is true that the grease could not be seen with the naked eye, but then, neither may a fingerprint be examined until there has been an application of ink."[4]

If the defendant had no reasonable expectation of privacy then the investigatory procedure is not a search. However, law enforcement has been bewildered by the

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(Continued from previous page)

nan court landed in the same position in which it felt the *Richardson court* had landed; an unsupported conclusion. *Keenan, supra,* at 182 - 183, n. 1. An accurate application of the *Schmerber* analysis to ultraviolet light examinations can be found in *Commonwealth v. DeWitt,* 226 Pa. Super. 372, 314 A.2d 27 (1973), a case which was not cited in *Keenan.*

4. Several other state and federal courts have used the *Katz* analysis to conclude that ultraviolet light examinations do not implicate fourth amendment rights. *See United States v. Richardson,* 388 F.2d 842 (6th Cir. 1968); *United States v. Millen,* 338 F.Supp. 747 (E.D. Wis. 1972); *United States v. DeMarsh,* 360 F.Supp. 132 (E.D. Wis. 1973).

problems of determining in any given situation the level of the expectation of privacy purported to be held by the individual, satisfying the first prong of the *Katz* test, or by society, satisfying the second prong.[5] For example, the presence of a third party when a conversation concerning illicit activities takes place, even when the third party is a trusted confident of the conspirators, certainly lends a diminished expectation of privacy. *See Hoffa v. United States,* 385, U.S. 293 (1966); *and also, United States v. White,* 401 U.S. 745 (1971). However, other situations which seemingly have the aura of privacy surrounding them, such as conversations in locked hotel rooms or with no one else present, give rise to no expectation of privacy. *See, e.g. United States v. Agapito,* 620 F.2d 324 (2d Cir. 1980) (individual who speaks in normal tones but is still overheard by the naked ear has no reasonable expectation of privacy); *United States v. Jackson,* 588 F.2d 1046, 1051-53 (5th Cir. 1979) (conversation in motel room which are audible to one in adjoining room constitute words exposed to the "plain view" of others.); *United States v. Llanes,* 398 F.2d 880 (2d Cir. 1968), *cert. denied,* 393 U.S. 1032 (1969) (individual who speaks in tone audible to person standing outside of his door has no expectation of privacy). Compounding this question of determining the level of privacy expected, some decisions indicate that even a reasonable expectation of privacy "must be subordinated

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5. This Court has recognized the difficulties inherent in determining which expectations are deemed reasonable by society; "[o]ur problem, in terms of the principles announced in *Katz,* is what expectations of privacy are constitutionally 'justifiable' — what expectations the Fourth Amendment will protect in absence of a warrant." *United States v. White,* 401 U.S. 745, 752 (1970).

to the public interest in law enforcement." *United States v. Fisch,* 474 F.2d 1071, 1078 (9th Cir. 1973), *cert. denied per curium,* 412 U.S. 921 (1973).[6]

What, then, is the standard to be used in evaluating the level of expectations of privacy when sensory enhancement devices are used by law enforcement? How is the constitutional standard affected when the device or investigatory technique is "limited by the procedure?" *United States v. Place,* 462 U.S. 696, 707 (1982). This court has determined that "[n]othing in the Fourth Amendment prohibits the police from augmenting the sensory facilities bestowed on them at birth with such enhancements as science and technology afford." *United States v. Knotts,* 460 U.S. 276, 282 (1983). It is the evaluation of the *use* of sensory enhancement devices and investigatory techniques which appears unworkable.

The standard to be applied appears to be vitally linked to the intrusiveness, or lack of it, of the investigatory method. Standards of reasonableness in fourth amendment cases have been delineated by balancing the need to search against the invasion which the search entails. *Camara v. Municipal Court,* 387 U.S. 523, 536-537 (1967). *See also, United States v. Albarado,* 495 F.2d 799, 806 (2d Cir. 1974). Justifications for any specific intrusion are dependent on a determination of whether the intrusion is a

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6. *See also, Camara v. Municipal Court,* 387 U.S. 523, 533 (1967) "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."

search or merely an investigatory procedure. For if the action is investigatory, justification need reach only the level of a "specific and articulable" suspicion rather than probable cause. *Terry v. Ohio*, 392 U.S. 1, 21 (1968)[7]. These seemingly clear cut pronouncements of the Court have not been easily applied in the context of new technologies.[8]

The amici believe this honorable Court has already begun to enunciate a clear test based on *Terry*, a test which law enforcement can utilize in evaluating whether investigatory procedures such as the use of sensory enhancement techniques constitute a "search". *United States v. Place, supra.* The examination of a person's hands, normally exposed to the public, under an ultraviolet light is analogous to the "canine sniff" analyzed in *Place.* "[T]he manner in which the information is obtained through this investigative technique is much less intrusive than a typical search." *Place, supra*, at 707.

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7. *See also United States v. Beale (Beale II)*, 736 F.2d 1289, 1294 (1984) (Pregerson, J., dissenting), *cert. denied* —— U.S. ——, 105 S.Ct. 565 (1985) in which Circuit Judge Pregerson argues that while limited in their intrusiveness, dog sniffs are searches, but they do not require warrants. Rather, a "founded or articulable" suspicion would be sufficient justification for the search. That there are some "permissable intrusions less severe than full scale searches or seizures without the necessity of a warrant," was also stated by this Court in post-*Terry* case of *Texas v. Brown*, 460 U.S. 730, 736 (1983) evincing that the doctrine is still developing.

8. *See United States v. Smith*, 643 F.2d 942 (2nd Cir. 1981), *cert denied* 454 U.S. 875 (1981) in which an x-ray scan of the defendant's person was deemed to be a search unsupported by probable cause but no warrant was required because the intrusion was tailored to the need for further investigation.

The person need only place his hand under the light for a few seconds. Being portable, the light can be carried to a location convenient to the person who will be examined, obviating the need for detention. The information obtained is extremely limited; only the presence or absence of fluorescent powder is disclosed. The ultraviolet technique does not offend or embarrass any innocent persons because it specifically and only shows the physical fact of the presence of fluorescent powder.[9] Prior to *Place,* some lower courts upholding "canine sniffs" placed emphasis on the idea that because no "mechanical or electronic device was used" the scrutiny of the technique should be lower. *People v. Evans,* 65 Cal. App.3d 924, 936, 134 Cal Rep 436, 443 (1977). This highly technical distinction between natural and mechanical means seems ill suited to a world filled with everchanging technological advances and inventions. *See United States v. Lee,* 274 U.S. 559, 563 (1927) (use of searchlight comparable to use of a marine glass); *Smith v. Maryland,* 442 U.S. 735, 744 - 745 (1979) (use of modern electronic switching equipment merely the modern counterpart of the operator); *United States v. Knotts, supra,* at 282 (beeper signal was the equivalent of visual surveillance). It can be said that fluorescent pow-

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9. The series of inquiries delineated in *Place* has been applied to other investigatory techniques being considered by lower courts. *Lucas v. United States,* 411 A.2d 360 (D.C. App. 1980), *reh'g denied* 414 A.2d 830 (D.C. App. 1981) "Unlike any technique heretofore passed upon by this court, this device does not search or scan generally for items in which the subject has a proprietary interest. It reveals nothing about the subject.... It is the preciseness of the sensormatic equipment, not in terms of detecting what it searches for but, more importantly, in terms of not detecting anything it is not searching for that makes its use reasonable." *Lucas, supra,* at 364.

der and the subsequent ultraviolet light examination is no more than a modern equivalent to a visual observation, by the officer, of the defendant handling the contraband or marked item. Similarly, an exploding dye packet placed in the contraband would result in a set of "naked eye" observations not only by law enforcement but by any member of the public similar, if not identical, to the findings produced by the fluorescent powder and ultraviolet light examination.

CONCLUSION

The instant case presents the Court with a clear fact pattern in which to resolve the conflicting viewpoints of both state and federal courts concerning the use of ultraviolet light examinations. The opportunity is available for the Court to provide those with law enforcement responsibilities a clear standard for the evaluation of existing and emerging sensory enhancement and investigation techniques while clarifying the effect on that analysis of techniques which are limited in intrusiveness, scope and manner of inquiry. Such a standard would also resolve the current problems associated with determinations of privacy levels expectations in a variety of factual situations.

Respectfully submitted,

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